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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1377

JOSEPH BONACORSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Joseph Bonacorsa respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on January 9, 1976.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. 1a. The memorandum and order, supplemental memorandum and order, and order amending supplemental memorandum and order of the District Court for the Eastern District of New York, denying petitioner's motion for a judgment of acquittal or a new trial, appear in the Appendix hereto, pp. 12a, 23a, and 30a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 9, 1976. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 26, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether, in order to convict a witness of having made a false declaration before a grand jury in violation of 18 U.S.C. § 1623 based upon an answer to a question that is sufficiently ambiguous to be susceptible to more than one reasonable interpretation, the government must establish that the witness did not interpret the question in a manner such that the answer given was true.

2. Whether a conviction under 18 U.S.C. § 1623 may be based upon a witness's answer to a question asked of him under oath by a federal prosecutor where:

(a) Prior to asking the question the prosecutor had already requested official authorization to seek a perjury indictment against the witness based upon the witness's prior testimony concerning the same subject matter; and

(b) The question is leading and susceptible to only two responsive answers either of which would be false under the prosecutor's interpretation of the question; but

(c) The answer given is true under a reasonable alternative interpretation of the question.

3. Whether a conviction based upon a general verdict as to a single count of making a false declaration before

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a grand jury in violation of 18 U.S.C. § 1623 may be sustained where:

(a) The count contains over two pages of questions and answers which are not broken down into separate specifications of perjury;

(b) In closing argument at trial the government argues that the count contains nine separate assignments of perjury and discloses for the first time the interpretation of several arguably ambiguous questions under which it claims several of the nine assignments are based;

(c) The evidence as to at least one of the nine assignments is insufficient to sustain a conviction and defense motions for judgment of acquittal at the close of the evidence, and for a mistrial after the government's closing argument, were denied.

4. Where a grand jury witness against whom a federal prosecutor has requested authorization to seek an indictment is recalled by the prosecutor for the purpose of obtaining additional evidence against the witness, and the witness is not informed of the decision to seek an indictment against him or fully advised or his Fifth Amendment rights, can evidence thereby obtained be used against the witness at trial?

5. Where two separate counts of an indictment allege violations of a criminal statute in identical language except for the dates of the offenses, one offense alleged to have occurred in February and the other in September, and the government's proof at trial establishes that both offenses occurred in September, may a conviction under the September count be based upon the criminal conduct for which the grand jury returned the February count?

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 1503. Influencing or injuring officer, juror or witness generally

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threaten-

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ing letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1623. False declarations before grand jury or court.

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Rule 29, Federal Rules of Criminal Procedure:

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence of-

fered by the government is not granted, the defendant may offer evidence without having reserved the right.

• • •

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

Statement of the Case

Introduction

In 1973, a special grand jury was investigating possible violations of 18 U.S.C. § 224 (sports bribery) in the New York harness racing industry. Petitioner, a licensed harness driver and trainer, was subpoenaed as a witness before the grand jury, and testified on four separate occasions, three times actually before the grand jury, and once in a deposition which was conducted by government counsel and later adopted by petitioner before the grand jury.

On December 19, 1973, the harness investigation culminated in an indictment charging 28 individuals with sports bribery. On the same day, a separate indictment was returned against petitioner which alleged one count of making a false declaration before the grand jury in violation of 18 U.S.C. § 1623, and two counts of obstruction of jus-

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tice in violation of 18 U.S.C. § 1503. On November 20, 1974, after a jury trial, petitioner was found guilty of the perjury count and one count of obstruction of justice, and was acquitted of the remaining count.

The charges against petitioner were based upon alleged "hidden ownership" of a racehorse. The government contended that a horse, known as Joli Timmy, although officially registered and ostensibly owned by petitioner, was actually secretly owned by another individual named Forrest Gerry. The single perjury count of the indictment alleged, in essence, that petitioner falsely denied such hidden ownership, and that he gave false answers to various questions concerning the manner in which the horse Joli Timmy was purchased. The obstruction of justice counts were based upon petitioner's alleged attempt, on two separate occasions, to influence the testimony of a witness who had participated in the sale of Joli Timmy.

The Ambiguous Assignments of Perjury

The single perjury count upon which petitioner was tried and convicted consists of 26 questions and answers excerpted from testimony given on three separate occasions. All of the testimony set forth in the indictment is alleged to be material and false. Separate specifications of perjury are not designated, nor is there any indication of which particular answers are claimed to be false, or in what respect the testimony is untruthful.[1]

It was not until closing argument at trial that the government delineated what it claimed were nine separate assignments of perjury. It was then, for the first time, that petitioner became aware of the interpretation which the government placed on several of the questions set

[1] The indictment is reproduced in the Appendix, *infra*, p. 33a.

forth in the indictment, and the theory under which some of the answers were claimed to be perjurious.

In its closing argument the government claimed that the following testimony, which concerns the purchase of the horse Joli Timmy, constituted five separate assignments of perjury:[2]

• • •

Q. What about the fifth horse [Joli Timmy]?

A. I didn't want to hold any money. The fifth horse I bought outright and I believe I remember the name of the people was Ruben. Steve Ruben.

Q. And anybody else?

A. I think he had a partner but I dealt with Steve because he was a trainer and so on and so forth and I got a bill of sale from him for the amount that I purchased the horse for and also we paid the City sales tax to the tax people for the amount of the horse.

Q. You dealt with him directly?

A. Yes.

Q. *How did you pay him, with a check or cash?*

A. *No cash.*

Q. Do you remember approximately when this was?

A. It was in February sometime, Hal. I don't know the exact date right offhand.

Q. *How many times did you deal with him, just that one time?*

A. With who is this?

Q. Mr. Ruben.

A. *Just the one time. Yes.*

Q. And this is for the horse Joli Timmy? Is that correct?

A. Right.

• • •

[2] The italicized questions and answers are discussed below.

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It was established at trial, and uncontested by petitioner, that in February, 1973, Forrest Gerry (the alleged "hidden owner"), delivered a sum of cash to Steve Rubin which represented payment for the horse Joli Timmy. It was also undisputed that this horse, together with its registration papers, and later a bill of sale, were delivered by Steve Rubin to petitioner, and that the horse was then officially registered in petitioner's wife's name, stabled in petitioner's stalls, and trained and raced by petitioner for several months following the sale.[3]

The principal controversy was that the government claimed that Forrest Gerry had purchased Joli Timmy for himself and become hidden owner, while petitioner contended that Gerry had merely delivered money that had been supplied by petitioner, and never had any interest in the horse.

The government argued that the response "No cash", to the question "How did you pay him [Rubin], with a check or cash?", was a separate assignment of perjury because the evidence established that Forrest Gerry, not petitioner, had delivered the payment for Joli Timmy to Rubin. (Appendix on Appeal, A-191). Petitioner contends however, that under an alternative, and more reasonable interpretation, the above question did not inquire as to who made the payment, but the form of the payment—whether check or cash. Under this interpretation, petitioner's answer "cash" was both responsive and literally true; the evidence did establish that the payment was in cash, not check.

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[3] It was also established that Gerry had negotiated with the sellers of Joli Timmy prior to the sale. However, there was also evidence that Gerry frequently acted as a "broker" for others (T.Tr. 28), and that he had been negotiating on behalf of a "New Zealand interest" (T.Tr. 64, 177, 191-192), but that deal had fallen through (T.Tr. 63, 64, 261). ["T.Tr." refers to pages of the trial minutes.]

The response "Just the one time. Yes", to the question "How many times did you deal with him [Rubin], just that one time?", was claimed to be another assignment of perjury because the payment for Joli Timmy had been made in two installments. (Appendix on Appeal, A-176).

Petitioner contends, however, that the interpretation of this question turns upon the meaning of the word "deal," which petitioner first employed (in verb form) in responding to a previous question (the second question set forth above). In the context there is simply no reasonable basis for taking "deal with" to mean "make payment to," as the government has done. Applying a far more plausible meaning to the words "deal with," petitioner's answer was true since there was no evidence that petitioner ever dealt with Rubin concerning anything other than the sale of Joli Timmy.

Petitioner also argues that neither of these two questions can properly support a specification of perjury because under the government's interpretation, the answers suggested in the questions themselves were false. In effect, the prosecutor both asked and answered the question, and because his answer was untrue under his interpretation, petitioner was charged and convicted of perjury. Furthermore, when the government's interpretation is applied to the question "How did you pay him, with a check or cash?", there simply is no responsive answer that is true.

Although they were both emphasized by petitioner on appeal, the court below did not discuss the ambiguity of either of these questions, except to comment, in a footnote, that petitioner's "argument is not supported by a dispassionate reading of the testimony." (App., *infra*, p. 7a, n.6).

The court below further held that even if ambiguity in several of the questions be assumed, petitioner had not preserved the error for review because, although a motion

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for judgment of acquittal directed at the entire perjury count was made at the close of the evidence, petitioner did not request withdrawal of any particular assignments of perjury. (App., *infra*, p. 8a). But as indicated above, the government did not disclose the basis of the separate assignments of perjury until its closing argument. Thus there was no opportunity for a more specific motion. Moreover, following the government's closing argument, petitioner moved for a mistrial, placing particular emphasis on the second question discussed above, and the fact that the theory advanced by the government was neither charged in the indictment nor supported by the evidence. (T. Tr. 509-511, 512-524).

Grand Jury Proceedings

Petitioner was served with a grand jury subpoena in May, 1973, and first testified before the grand jury on June 11, 1973. He was recalled, and testified for a second time on September 14, 1973.

On December 13, 1973, the federal prosecutors sought authorization from the Department of Justice to seek an indictment against petitioner for perjury and obstruction of justice. The perjury charge was based upon petitioner's allegedly false denial, in his September grand jury testimony, that Forrest Gerry was the actual owner of any of his horses. On December 17, 1973, after the government had requested authorization to seek an indictment against him, petitioner was again called to testify before the grand jury. However, because a quorum of grand jurors was not present on that day (due to inclement weather) petitioner submitted to a deposition by the prosecutor.

Prior to deposing petitioner on December 17, the government did not inform petitioner of the decision to seek an indictment against him. Petitioner was also not in-

formed of the reason that he was recalled, which, according to the testimony of the prosecutor at a post-trial hearing, was as follows:

> • • • Before the 17th I realized there might be a possible opening whereby Mr. Bonacorsa did not commit perjury at all and only by questioning him as to relating to those facts would we in fact find out whether that would be the case. Specifically, I remember Mr. Bonacorsa said that Forrest Gerry was his agent in going to Steve Rubin to buy the horse; then in fact I didn't think it would be very possible that there would not be conclusive evidence to show that Mr. Bonacorsa owned it. • • • (H.Tr. 22).

Thus, because the prosecutor doubted that he would be able to prove the government's basic claim of hidden ownership of Joli Timmy, he recalled petitioner to question him concerning details of the purchase of the horse. It was during this testimony that the government obtained seven of the nine assignments of perjury which were eventually argued in summation at petitioner's trial.

Two days after the deposition, on December 19, 1973, petitioner was recalled before the grand jury for a third time for the purpose of identifying and adopting a transcript of the December 17 deposition. Prior to testifying, he was still not informed of the government's intention to seek an indictment against him, and he was not fully advised of his Fifth Amendment rights.[4] Later that day, the grand jury returned an indictment (No. 73 CR 1069) against petitioner charging perjury and obstruction of justice which was subsequently superseded by an indictment

[4] Although advised of the right to remain silent, petitioner was not advised that any statements he made could and would be used against him.

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(No. 74 CR 134) which included the seven additional assignments of perjury based upon the December 17 deposition.

Variance in Proof of Obstruction of Justice

Counts 2 and 3 of the indictment allege that petitioner corruptly endeavored to influence the testimony of a witness (Steve Rubin) in violation of 18 U.S.C. § 1503. The two counts, which essentially recite the language of the statute, are identical except that count 2 alleges an offense occurring "On or about the last week in February, 1973", and count 3 alleges an offense "On or about the month of September, 1973." The charges were based upon statements allegedly made by petitioner to Steve Rubin, to the effect that if anyone asked Rubin who had bought Joli Timmy, he should say it was petitioner.

At trial the government presented no evidence under count 2 because Steve Rubin testified, contrary to his grand jury testimony, that both attempts by petitioner to allegedly influence his testimony occurred in September. The jury returned a guilty verdict under count 3 and a not guilty verdict under count 2.

In the court below petitioner argued that this variance amounted to an impermissible amendment of the indictment which vitiated the verdict under count 3. The court rejected this contention, stating that the "conviction under count 3 was not invalidated by proof that more wrongdoing than was originally thought occurred in September." (App., *infra*, p. 9a).

Reasons for Granting the Writ

I

The decision below is in conflict with the fundamental principle that precise questioning is imperative as a predicate for the offense of perjury, and that where a question is susceptible to more than one reasonable interpretation, a conviction must be based upon proof that the witness's answer was false under *his* interpretation of the question.

In *United States* v. *Bronston,* 409 U.S. 352 (1973), this Court considered the question of whether a witness may be convicted of perjury for an answer that is literally true but not responsive to the question asked and arguably misleading by negative implication. In a unanimous opinion, the Court noted that "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry" (409 U.S. at 360), and that "[p]recise questioning is imperative as a predicate for the offense of perjury" (409 U.S. at 362). The Court held that the state of mind of the witness is relevant only to the extent that he does not believe his answer to be true (409 U.S. at 359), and that a perjury conviction cannot be based upon a literally true answer even if unresponsive and possibly intended to mislead.

This case presents the related and recurring problem of what proof is required where an assignment of perjury is based upon a question which can reasonably be interpreted in more than one way, and the answer given by the witness is true under one such interpretation. See *United States* v. *Diogo,* 320 F.2d 898 (2d Cir. 1963); *United States* v. *Paolicelli,* 505 F.2d 971 (4th Cir. 1974); *Van Liew*

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v. *United States,* 321 F.2d 674 (5th Cir. 1963); *United States* v. *Wall,* 371 F.2d 398 (6th Cir. 1967); *Galanos* v. *United States,* 49 F.2d 898 (6th Cir. 1931); *United States* v. *Isaacs,* 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); *United States* v. *Cook,* 489 F.2d 286 (9th Cir. 1973) [and see original opinion at 497 F.2d 753]; *United States* v. *Chapin,* 515 F.2d 1274 (D.C. Cir. 1975); *United States* v. *Lattimore,* 127 F.Supp. 405 (D.D.C.), *aff'd,* 232 F.2d 334 (D.C. Cir. 1955); *United States* v. *Cobert,* 227 F.Supp. 915 (S.D.Cal. 1964); *United States* v. *Razzia,* 370 F.Supp. 577 (D.Conn. 1973).

As discussed above (*supra,* pp. 7-10), at least two of the assignments of perjury upon which petitioner's conviction is based fall into this category. Under a reasonable interpretation of the questions asked of him, petitioner's answers were responsive and truthful, and there is no basis in the record for a finding that petitioner did not so interpret the questions.

In rejecting petitioner's argument concerning ambiguity, the court below stated that "[a]bsent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of appellant's answer was for the jury. *United States* v. *Wolfson,* 437 F.2d 862, 878 (2d Cir. 1970)." (App., *infra,* p. 7a). We submit that this is not a workable standard, and merely avoids analysis of the problem.

We believe the proper standard was applied in *United States* v. *Wall, supra,* 371 F.2d 398 (6th Cir. 1967):

> The trouble with this case is that the question upon which the perjury charge was based, was inarticulately phrased, and, as admitted by the prosecution, was susceptible of two different interpretations. In our opinion, no charge of perjury can be based upon an answer to such a question.

> If Mrs. Wall had understood the question to mean whether she had accompanied Swarthout on any trips, then so far as the record is concerned, her answer was correct and truthful. If the Government desired to elicit proof as to whether Swarthout and she had ever stayed together in a motel room in Miami Beach, or elsewhere, it could easily have phrased a proper question designed to obtain such information.
>
> Where the defendant is under oath and in response to a question asked of him gives an answer which is "literally accurate, technically responsive or legally truthful," he cannot be convicted lawfully of perjury. . . .
>
> This must be so because the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony. . . . In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer. . . .
>
> There was no evidence to show what the question meant to Mrs. Wall when she answered it. In the absence of such evidence, no determination could be made as to the falsity of her answer. The evidence was insufficient to support the conviction. . . .

371 F.2d at 399-400. Also see *United States* v. *Lattimore, supra,* 127 F.Supp. 405 (D.D.C.), *aff'd,* 232 F.2d 334 (D.C. Cir. 1955); *Van Liew* v. *United States,* 321 F.2d 674, 682-683 (5th Cir. 1963); *United States* v. *Cook, supra,* 497 F.2d 753, 764-770 (9th Cir. 1972) (Ely, J., dissenting).

In addition to the need for establishment of a uniform, workable standard regarding ambiguity in federal perjury

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prosecutions, this case provides an opportunity for the Court to condemn questioning of a grand jury witness such as occurred here. For in addition to the imprecision of the prosecutor's questions, he repeatedly asked leading questions which suggested answers that he believed to be false. Such baiting of a witness to give perjurious testimony can only serve to impede the administration of justice by inhibiting potential witnesses from testifying at all before a grand jury.

II

The decision below is in conflict with the rule that requires a verdict to be set aside where it is supportable on one ground, but not on another, and it cannot be determined which ground the jury selected.

In *Yates* v. *United States,* 354 U.S. 298, 312 (1957), this Court held that a guilty verdict must be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to determine which ground the jury selected. Also see, *Stromberg* v. *California,* 283 U.S. 359, 367-68 (1930); *Street* v. *New York,* 394 U.S. 576, 585-86 (1969). In *Vitello* v. *United States,* 425 F.2d 416, 419 (9th Cir. 1970) this principle was applied in a perjury case where the court wrote that "the teaching of *Yates* should be here applied if we find . . . that there was insufficient evidence to be submitted to the jury on any one or more of the specifications of falsity . . . ."

Without questioning this well established principle, the court below held that even if some of the questions set forth in the indictment were too ambiguous to support a perjury conviction, the error had not been preserved for appellate review:

> A motion directed against the entire count, as in the instant case, is not the equivalent of a motion to withdraw from the jury any of the specific assignments of perjury contained in such count. . . . Because of appellant's failure to move for the withdrawal of the allegedly ambiguous questions and answers as possible assignments of perjury or in some equivalent manner to focus the attention of the trial court on their asserted infirmities, the error allegedly resulting from their submission has not been preserved for review by this Court. . . .

(App., *infra*, p. 8a).

In so holding, the court relied on its recent decision in *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), which in turn was based upon *United States* v. *Mascuch*, 111 F.2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940) and *United States* v. *Goldstein*, 168 F.2d 666 (2d Cir. 1948).

None of these cases was based upon the statute involved here, 18 U.S.C. § 1623. Furthermore, and most importantly, unlike any of the above cases, the perjury count of the indictment in the present case merely sets forth numerous questions and answers excerpted from petitioner's grand jury testimony without alleging separate specifications or in any manner indicating which of the answers were actually claimed to be false. It was not until the government's closing argument at trial that nine separate assignments of perjury were particularized, and petitioner first became aware of the specific questions and answers which the government was relying upon, and the interpretation it was attaching to them.[5] Therefore, at the

[5] Whether the particular assignments urged by the prosecutor at trial at all correspond to the charges for which the grand jury returned the indictment is purely a matter of speculation under

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close of the evidence, petitioner could not possibly have made a motion under Rule 29, Fed.R.Crim.P., directed at specific assignments of perjury; for at that point he was unaware of the specific assignments.

Furthermore, the court's statement that petitioner failed "in some equivalent manner to focus the attention of the trial court on the asserted infirmities" of the assignments of perjury is simply not supported by the record. For in addition to twice interrupting the government's summation to object to argument concerning "lies" not specified in the indictment (Appendix on Appeal, A-184, 194), after the summation was concluded petitioner's counsel moved for a mistrial on the ground that the prosecutor's argument referred to assignments of perjury neither charged in the indictment nor supported by the evidence. (T. Tr. 509-511, 512-524). Even after this motion was initially denied, counsel continued to press the point and certainly "focus[ed] the attention of the trial court" on one of the particularly objectionable assignments argued by the prosecutor (T. Tr. 516):

> DEFENSE COUNSEL: I don't agree. I'll go further and point out other instances.
>
> On page four hundred seventy line twelve, he says "How many times did you deal with him, just one time —who is this Mr. Rubin, just one time—yes—and this is for the horse Jolly/Timmie one time—well, you heard it right there, here's another lie you could find."
>
> There is no place in the indictment that he's charged with lying, that he said that it was just one time reference to the horse Jolly/Timmie.

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these circumstances. The invalidity, and susceptibility of such an indictment to impermissible amendment at trial, is readily apparent.

"How many times—twice—he was paid twice in two installments."

THE COURT: "Question, just the one time—yes."

DEFENSE COUNSEL: "How many times — twice — was paid twice in two installments."

He's telling the Jury that the perjury has reference to the two payments, not that he only negotiated once.

I'll make my record, if I may. . . .[6]

In sum, the net effect of the decision below is to permit the government to frame an indictment under 18 U.S.C. § 1623 based upon a series of ambiguous questions asked of a witness under oath, in the strain of a grand jury proceeding, and then, in summation at trial, after all evidence has been presented and defense arguments made, for the first time to disclose precisely how the defendant allegedly gave "false material declarations." While Congress may indeed have intended to relax the government's burden of proof in perjury prosecutions under § 1623 by eliminating the so-called "two-witness rule," surely it never contemplated a conviction under circumstances such as these.

[6] Counsel was referring, of course, to the question and answer discussed *supra*, p. 10.

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III

The decision below sanctions use of the grand jury soley for the purpose of having a future defendant unknowingly become a witness against himself.

On December 17, 1973, petitioner was to appear before the grand jury for a third time to testify concerning his purchase of racehorses. At that time, unbeknown to petitioner, the government had already decided to seek an indictment against him for his allegedly false denial that his horses were secretly owned by another individual. But because a quorum of grand jurors was not present on that day (due to inclement weather) petitioner submitted to a deposition, which he adopted before the grand jury two days later. Thereafter, the testimony which the government obtained during the deposition was incorporated into a superseding indictment and was the basis of seven of the nine assignments of perjury relied upon by the government at trial.

Prior to testifying at the deposition on December 17, and prior to testifying before the grand jury on December 19 (the same day the original indictment was returned against petitioner), government counsel did not inform petitioner of the government's intention to seek an indictment against him, nor was petitioner advised that the testimony he was about to give could and would be used as evidence against him. Yet, at a post-trial hearing, government counsel conceded that he recalled petitioner because he "realized there might be a possible opening whereby Mr. Bonacorsa did not commit perjury at all and only by questioning him as to relating to those facts would we in fact find out whether that would be the case." (H.Tr. 22).

Thus, petitioner was recalled not in furtherance of the special grand jury investigation of sports bribery in har-

ness racing, but for the specific purpose of helping to establish the government's perjury case against him. While it seems doubtful that such a practice could be condoned under any circumstances, it was especially improper here, where petitioner was never informed of his status as a virtual defendant, not fully advised of his Fifth Amendment rights, and both he and his attorney stated, in post-trial proceedings, that they had been misled by government counsel into believing that petitioner was not going to be indicted for any crime. (Appendix on Appeal, A-259-260; 281).

Either as a matter of constitutional law, or on the basis of the Court's supervisory authority over the administration of federal criminal justice,[7] this case presents an opportunity to correct a gross misuse of the federal grand jury.

IV

The court below has affirmed a conviction based upon proof of charges for which there was no grand jury indictment as required under the Fifth Amendment.

Counts 2 and 3 of the indictment alleged obstruction of justice in violation of 18 U.S.C. § 1503 in identical language except for the dates of the alleged offenses. Count 2 alleged an offense "On or about the last week in February, 1973", and Count 3 a separate offense occurring "On or about the month of September, 1973." (App., *infra*, pp. 41a-43a). At trial, the sole government witness to the alleged offenses (Steve Rubin) departed from his grand

[7] See *McNabb* v. *United States*, 318 U.S. 332, 340 (1943); *United States* v. *Calandra*, 414 U.S. 338, 346 n.4 (1974).

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jury testimony and stated that both attempts to influence his testimony occurred in September. Based upon this testimony, the jury acquitted petitioner of the February count (Count 2) and returned a guilty verdict as to the September count (Count 3).

Because of lack of specificity in the indictment, the government was thus permitted to prove under Count 3 the offense for which the grand jury returned Count 2. The net effect was an impermissible amendment of the indictment, and a conviction based upon a charge which had never been presented to the grand jury.

This variance of seven months was most prejudicial. For as argued in the court below (Appellant's Brief, p. 28), it was far easier for the government to establish a motive for petitioner to attempt to corruptly influence Steve Rubin in September than in February. In February, petitioner was not even aware of the grand jury investigation of harness racing. While in September, the investigation was well publicized and at peak intensity, and petitioner had himself already been subpoenaed as a witness, and twice testified.

The opinion below, which dismisses this fundamental defect as mere "proof of more wrongdoing than was originally thought occurred in September" (App., *infra*, p. 9a), is in clear conflict with the Fifth Amendment and the decisions of this Court in *Stirone* v. *United States*, 361 U.S. 212, 217 (1960); *Russell* v. *United States*, 369 U.S. 749, 770-771 (1962); and *Berger* v. *United States*, 295 U.S. 78 (1935).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Attorneys for Petitioner

March 1976

APPENDIX

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OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 377—September Term, 1975.

(Argued October 23, 1975 Decided January 9, 1976.)

Docket No. 75-1284

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH BONACORSA,

Defendant-Appellant.

Before:

MOORE, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Thomas C. Platt, *Judge,* convicting appellant on one count of making a false declaration to a grand jury in violation of 18 U.S.C. § 1623 and on another count of obstruction of justice in violation of 18 U.S.C. § 1503.

Affirmed.

J. M. ROTHBLATT, New York, N. Y. (Rothblatt, Rothblatt, Seijas & Peskin, of Counsel), *for Defendant-Appellant.*

SHIRLEY BACCUS-LOBEL, Washington, D.C. (David G. Trager, United States Attorney, Eastern

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District of New York, of Counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

In 1973, a special grand jury was investigating harness racing in the New York metropolitan area. Several of those who came under investigation were indicted and convicted of sports bribery. *See United States* v. *Gerry,* 515 F.2d 130 (2d Cir. 1975). Others were indicted and convicted for lying to the grand jury. *See United States* v. *Turcotte,* 515 F.2d 145 (2d Cir. 1975). Appellant falls within the latter group. He was convicted of perjury (18 U.S.C. § 1623)[1] for falsely testifying about the ownership of a horse and his relationship with Forrest Gerry, one of the defendants in the above cited cases. He was also convicted on a count of obstructing justice (18 U.S.C. § 1503)[2] by attempting to influence another grand jury witness to testify falsely in support of his own perjurious testimony.

The innocent cause of appellant's troubles was a standardbred named Joli Timmy who, until February 1973, was owned by Leonard and Richard Schweitzer. Steven Rubin, the Schweitzers' trainer, convinced them that the horse should be sold and thereafter arranged a deal with Gerry, whose owner's license had been revoked. Although Gerry at first represented that he was acting on behalf of an

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1 18 U.S.C. § 1623(a) provides in part:

> Whoever under oath in any proceeding before . . . any . . . grand jury of the United States knowingly makes any false material declaration . . . shall be fined [and/or imprisoned].

2 18 U.S.C. § 1503 provides in part:

> Whoever corruptly . . . endeavors to influence . . . any witness, in any court of the United States . . . or endeavors to influence, obstruct, or impede the due administration of justice shall be fined [and/or imprisoned].

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interest in New Zealand, the jury was entitled to find that he actually made the purchase for himself. After Gerry paid Rubin in cash, he directed him to deliver the horse and blank registration papers to appellant. Bonacorsa thereafter trained Joli Timmy and raced it in his wife's name.

On June 11, 1973, appellant testified before the grand jury that he owned the horses which he had recently purchased and that he had no secret partners. Sometime in September, according to the government's proof, appellant secured from Rubin a handwritten bill of sale for Joli Timmy backdated to February 16, 1973, and indicating the purchaser to be Mrs. Bonacorsa. Bonacorsa told Rubin at that time, and again several weeks later, that if Rubin were to be questioned he should identify Bonacorsa as the purchaser.

On September 14, 1973, appellant was recalled before the grand jury and gave the first testimony alleged to be false in count 1 of the superseding indictment.[3] On December 19, 1973, Bonacorsa was recalled once more and, through a deposition taken on December 17, 1973, and read to the grand jury,[4] again denied having had any

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3 Appellant's September 14, 1973 testimony as set forth in count 1 of the indictment reads as follows:

> Q. Are any horses which you now own or train or have driven really owned by Forrest Gerry?
>
> A. No, sir.
>
> * * * * *
>
> Q. Did you ever purchase race horses for Forrest Gerry under your name or your wife's name?
>
> A. No.
>
> Q. Or anyone else's name.
>
> A. No.
>
> Q. Do you know if Forrest Gerry ever purchased horses under anyone else's ownership?
>
> A. No, I don't.

4 Because a grand jury quorum was not present on December 17, 1973, appellant's testimony was taken by deposition in the presence of his

business dealings with Gerry. This testimony made up the remainder of count 1.[5]

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attorney. This deposition was thereafter incorporated by reference into appellant's December 19, 1973, testimony.

5 Appellant's December 19, 1973, testimony as contained in count 1 of the indictment reads as follows:

Q. Now, Monday you were here and there weren't enough Grand Jurors and because there weren't enough Grand Jurors we had a deposition taken, is that correct?

A. Yes.

Q. And we have the minutes which you have in your hand, is that correct?

A. Yes.

Mr. Meyerson: Let's mark this for identification as a Grand Jury Exhibit.

(Whereupon, the aforementioned transcript was marked Grand Jury Exhibit 2, as of this date, by the reporter.)

Q. Have you read this deposition?

A. Yes.

Q. Which is Grand Jury Exhibit 2?

A. Yes.

Q. Is everything you said in there the truth and accurate?

A. Yes, sir.

Q. And is it all accurate as to what you did say at that time?

A. I believe it is, Mr. Meyerson.

Q. And you stick to those statements today, is that correct?

A. Yes.

Q. And if you were asked the same questions today, you would answer in the same way?

A. Yes, Mr. Meyerson.

Q. You adopt those statements as yours for the purposes of this proceeding?

A. Yes, Mr. Meyerson.

Grand Jury Exhibit #2 states in pertinent part, as follows:

Q. What about the fifth horse?

A. I didn't want to hold any money. The fifth horse I bought outright and I believe I remember the name of the people was Ruben. Steve Ruben.

Q. And anybody else?

A. I think he had a partner but I dealt with Steve because he was a trainer and so on and so forth and I got a bill of sale from him for the amount that I purchased the horse for and also we paid the City sales tax to the tax people for the amount of the horse.

Since the government's case rests in substance upon its claim that Gerry was the true owner of Joli Timmy, appellant's opening salvo is aimed at the sufficiency of the government's proof on this point. Appellant offered testimony purporting to show that the money used to purchase Joli Timmy was borrowed by him from other sources, and he contends that, on all the evidence, his motion for a judgment of acquittal should have been granted. However, this determination was for the jury; and, viewed in the light most favorable to the government, *United States* v. *Gerry, supra,* 515 F.2d at 134, the evidence was sufficient

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Q. You dealt with him directly?
A. Yes.
Q. How did you pay him, with a check or cash?
A. No cash.
Q. Do you remember approximately when this was?
A. It was in February sometime, Hal. I don't know the exact date right offhand.
Q. How many times did you deal with him, just that one time?
A. With who is this?
Q. Mr. Ruben.
A. Just the one time, yes.
Q. And this is for the horse Joli Timmy? Is that correct?
A. Right.

* * * * *

Q. I would like to go over now your testimony concerning Forrest Gerry.
A. Okay.

* * * * *

Q. And did you ever have any business deals with him at all?
A. No. No.
Q. No business dealings with him?
A. No. Not that I can remember of any type. The only business dealing I ever had with Forrest Gerry was when I first met him, many years ago. It must have been fifteen years or better. A young boy come to the track was looking for a goat and I sold him a goat for $10.

* * * * *

Q. You never bought or sold horses from him?
A. No, I didn't.
Q. And he was never your agent in buying or selling any horses?
A. No.

for the jury to conclude that Gerry paid for the horse and that it belonged to him.

Appellant next contends that several of the questions asked of him before the grand jury were sufficiently ambiguous to support more than one reasonable interpretation, under one of which the answers given would be true. Appellant's counsel submits, for example, that appellant's answer to the question "And anybody else?" on his December 19 grand jury appearance could be construed to be true, because appellant did receive the horse and a bill of sale from Steve. This, counsel says, might be what appellant was referring to by use of the phrase "dealt with". This interpretation promptly loses the facial plausibility given it by counsel if the answer is kept in the proper sequence of testimony where it belongs. In the immediately preceding answer, appellant stated that he "bought" the fifth horse outright and he believed the "name of the people was Rubin". The question "And anybody else?" could not reasonably be construed to refer to anyone but the person from whom appellant had bought the horse. In any event, it was for the jury to decide whether appellant gave, or could have given, any other meaning to the question. *Seymour* v. *United States*, 77 F.2d 577, 584 (8th Cir. 1935).

A defense to a charge of perjury may not be established by isolating a statement from context, giving it in this manner a meaning entirely different from that which it has when the testimony is considered as a whole. *Meyers* v. *United States*, 171 F.2d 800, 806 (U.S.App.D.C. 1948), *cert. denied*, 336 U.S. 912 (1949). If, in the natural meaning in the context in which words were used they were materially untrue, perjury was established. *United States* v. *Jones*, 374 F.2d 414, 420 (2d Cir.), *vacated on other grnds.*, 392 U.S. 299 (1968). It is clear that the grand jury was attempting to ascertain whether appellant was front-

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ing for Gerry in the purchase and alleged ownership of Joli Timmy. When viewed with anything but the partisan eye of an advocate, the questions, as they followed one upon the other, were pointed toward the development of this information. Absent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of appellant's answer was for the jury. *United States* v. *Wolfson,* 437 F.2d 862, 878 (2d Cir. 1970).

Even if ambiguity in several of the questions be assumed,[6] this does not mean that the conviction on the perjury count must be reversed. It is customary, and ordinarily not improper, to include more than one allegedly false statement in a single count. Fed.R.Crim.P. 7(c); *United States* v. *Mascuch,* 111 F.2d 602 (2d Cir.), *cert. denied,* 311 U.S. 650 (1940); *United States* v. *Edmondson,* 410 F.2d 670, 673 n.6 (5th Cir.), *cert. denied,* 396 U.S. 966 (1969); *Arena* v. *United States,* 226 F.2d 227, 236 (9th Cir. 1955), *cert. denied,* 350 U.S. 954 (1956). Also included on occasion is enough of the testimony surrounding the allegedly false statements to place them in coherent context. *Stassi* v. *United States,* 401 F.2d 259, 262 (5th Cir.), *vacated on other grnds. sub nom. Giordano* v. *United States,* 394 U.S. 310 (1968).

It is therefore unnecessary that every question and answer contained in a single count be sufficient to support the charge of perjury. *United States* v. *Pollak,* 474 F.2d 828, 831 (2d Cir. 1973). Where there are several specifications of falsity in a single count, proof of any of the specifications is sufficient to support a verdict of guilty.[7] *United States* v. *Mascuch, supra; Vitello* v. *United States,* 425

6 Appellant contends that the four questions which follow "And anybody else?" are either ambiguous or unfair. This argument is not supported by a dispassionate reading of the testimony.

7 This was the specific charge of the District Court to which no exception was taken.

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F.2d 416, 418 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970); *Arena* v. *United States, supra; United States* v. *Edmondson, supra.* Moreover, a motion directed against the entire count, as in the instant case, is not the equivalent of a motion to withdraw from the jury any of the specific assignments of perjury contained in such count. *United States* v. *Mascuch, supra,* 111 F.2d at 603; *United States* v. *Goldstein,* 168 F.2d 666, 671 (2d Cir. 1948). We have recently affirmed the validity of the so-called *Mascuch-Goldstein* rule in *United States* v. *Natelli,* —— F.2d —— (2d Cir. July 28, 1975), slip op. 5165; *rev'd in part on rehearing,* —— F.2d —— (October 6, 1975), slip op. 6297; *original opinion reinstated in all respects on second rehearing,* —— F.2d —— (December 4, 1975), slip op. 913, and we think it properly applicable in the instant case. Indeed, adherence to this rule is virtually mandated if the use of multiple, single-question counts in perjury indictments is to be avoided. Because of appellant's failure to move for the withdrawal of the allegedly ambiguous questions and answers as possible assignments of perjury or in some equivalent manner to focus the attention of the trial court on their asserted infirmities, the error allegedly resulting from their submission has not been preserved for review by this Court. *United States* v. *Natelli, supra.*

Counts 2 and 3 of the indictment both charge obstruction of justice. Appellant, who was acquitted on count 2 and convicted on count 3, now asserts a variance between pleading and proof on the latter count, which, he says, requires reversal of his conviction on this count. Count 2 alleges that appellant corruptly endeavored to influence Steven Rubin in February 1973, and count 3 alleges in identical language that similar improper conduct took place in September. Apparently, these counts were broken down

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in this manner because of Rubin's grand jury testimony that appellant secured the phony bill of sale for Joli Timmy in February. Since Rubin's testimony at trial was that the transfer of the bill of sale and appellant's several attempts to influence his testimony all took place in September, the jury quite properly acquitted on count 2. However, appellant's conviction under count 3 was not invalidated by proof that more wrongdoing than was originally thought occurred in September.

Appellant's only other claim of error meriting comment is that he was recalled before the grand jury after the decision had been made to seek an indictment against him and that this was done without fully advising him of his constitutional rights. It is undisputed that on December 13, 1973, six days prior to appellant's last grand jury appearance, government counsel wrote to the Department of Justice in Washington requesting authorization to seek an indictment against appellant, and the original indictment was handed up on December 19, after appellant had completed his testimony.

This sequence of events prompted the District Court to hold an evidentiary hearing following appellant's post-trial motions, and the following facts were found or stipulated:

(a) On September 14, 1973, a group of subpoenaed witnesses, which included appellant, was told by government counsel that they were potential targets of the grand jury investigation;

(b) At the same time, government counsel gave *Miranda* warnings to the witnesses;

(c) Appellant was represented by counsel at the time of his appearances before the grand jury, and counsel was physically present when appellant's deposition was taken on December 17, 1973;

(d) Appellant was advised in the presence of his counsel on December 17, 1973, of his right to be represented by an attorney and to remain silent.

We have held on numerous occasions that the government is not precluded from summoning as a grand jury witness one who has become a target of inquiry or a prospective defendant. *See* e.g. *United States* v. *Winter*, 348 F.2d 204, 207 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965); *United States* v. *Sweig*, 441 F.2d 114, 121 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); *United States* v. *Corallo*, 413 F.2d 1306, 1328 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969). The District Court, after a comprehensive review of the facts, found that appellant was advised of both his status as a potential defendant and his rights resulting therefrom. This clearly distinguishes this case from *United States* v. *Mandujano*, 496 F.2d 1050 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975) (argued 11/5/75), relied upon by appellant, and places it more in line with our own decision in *United States* v. *Corallo*, *supra*, where we found similar warnings to be "completely adequate." *Id.* at 1329. Moreover, appellant's attorney was at his side when his crucial testimony was taken by deposition on December 17, 1963, which was not the situation in either *Mandujano* or *Corallo*. Under all these circumstances, we see no basis for excluding appellant's December 19 testimony or reversing the conviction for perjury based thereon.

We have fully reviewed and reject all of appellant's other assertions of prejudicial error. There is no merit in his claims based on the trial court's evidentiary rulings, *Post* v. *United States*, 407 F.2d 319, 324 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969), and its participation in the examination of witnesses, *United States* v. *McCarthy*, 473 F.2d 300, 308 (2d Cir. 1972), and nothing of substance

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in appellant's complaints concerning allegedly improper comments and questions by the prosecution. *United States* v. *Brown*, 456 F.2d 293, 295 (2d Cir.), *cert. denied*, 407 U.S. 910 (1972). No prejudice resulted from the fact that the jury was at first given the original rather than the superseding indictment. Everything in the former was incorporated into the latter, and the matter was properly and adequately handled by the court's instructions to the jury. *Cf. United States* v. *Warner*, 428 F.2d 730, 736-737 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970).

We believe that appellant received a fair trial and that the evidence was sufficient to support his conviction. We affirm.

MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA — 73 CR 1069

-against- — MEMORANDUM AND ORDER

JOSEPH BONACORSA, — May 6, 1975

Defendant.

- -x

PLATT, D.J.

Defendant moves pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure for judgment of acquittal, or, in the alternative pursuant to Rule 33 of such Rules, for a new trial on some 33 seperately stated grounds, plus certain additional sub-grounds.

Defendant's principal arguments appear to be contained in his 11 point memorandum of law and these will be discussed herein.

I

Defendant's first contention is that the indictment is fatally defective because of an alleged ambiguity in and excessive repetition of the questions asked of the defendant and the failure of the government to ask a single question which focused directly on the matter in issue.

a. Ambiguity. Defendant complains that the words "dealt", "deal", "deals" and "dealings" are ambiguous and cannot be used in connection with the prosecution and conviction for the crime of perjury.

It is true, as defendant argues, that such words carry some 18 different definitions in the American College Dictionary, Random House, 1969 Edition, but only the 4th - "to trade or do business" - fits the context in which the defendant and the prosecutor use the word in their questions and answers. There is nothing ambiguous about the question "You dealt with him [Steve Ruben] directly?" when used in this sense. The context in which the words were used in each instance clearly indicated that the parties understood that the word would be used in the dictionary sense thereof.

b. Repetitious questioning. The defendant on the one hand claims that he was not given an adequate opportunity to explain whatever his relationship with Forrest Gerry, Jr. was and at the same time defendant argues in effect that he was repeatedly asked the same type of question. The Court does not see the logic to all of this and a re-reading of the indictment shows that the defendant was given an adequate opportunity to state what, if any, role Mr. Gerry played in the transaction in question but chose not to reveal the same.

c. Question on the matter in issue. In this case the key questions were who paid for and who was the actual owner of the horse Jolly Timmy. By its verdict on counts 1 and 3 of the indictment the jury obviously found that

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Mr. Gerry paid for the horse and was the true owner thereof, that the horse was placed in the defendant's wife's name as a nominee pursuant to a "business deal" of some sort between defendant and Mr. Gerry and the defendant advised Mr. Ruben "If anybody asked, the horse belonged to him [the defendant]; he bought the horse." (Tr. 138). The questions were clearly designed to elicit the facts with respect to these issues.

For the foregoing reasons defendant's first point is without merit.

II

Defendant argues that the government failed to prove beyond a reasonable doubt that Mr. Gerry was the actual owner of the horse Jolly Timmy asserting that proof thereof "was virtually non-existent". The uncontradicted proof showed, however, and the jury apparently found that Mr. Gerry negotiated the purchase of the horse Jolly Timmy from Messrs. Fletcher and Ruben and personally paid them $3500 in two cash installments for the horse. The proof further showed and the jury apparently found that Mr. Bonacorsa told Mr. Ruben if anyone asked he [the defendant] was the owner of the horse and that he bought the horse. Such admonition, of course, would not have been necessary had the defendant actually purchased the horse. Under the circumstances, the uncontradicted proof established this fact also to the jury's satisfaction.

FPI—GD—3-17-72—20M—0183

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III

The defendant contends that count 3 of the indictment should be dismissed because of lack of specificity and material variance between the offense charged and the proof at the trial.

a. Lack of specificity. If the indictment was not specific enough to apprise the defendant of the nature of the charge against him, he should have sought relief with respect thereto prior to the trial. See Rule 7(c)(1) and Rule 7(f) of the Federal Rules of Criminal Procedure.

b. Material variance. Defendant argues that because the proof only showed that Mr. Ruben was advised by Mr. Bonacorsa that he should tell anyone who asked that it was the defendant's horse in September of 1973 as charged in count 3 of the indictment and not also in February of 1973 as charged in count 2 of the indictment, there was a variance of such magnitude as to vitiate the verdict.

The fact is, however, that the defendant and his lawyer did not even appreciate this alleged insufficiency of proof with respect to count 2 of the indictment until after the jury had returned its verdict. The jury itself fully comprehended the evidence in the case and returned a correct verdict of "not guilty" with respect to count 2 of the indictment because of a failure of proof as to such count and at the same time returned a verdict of guilty with respect to count 3 of the indictment pertaining to the statements which were made in September of 1973. If the jury's verdict had been otherwise, defendant might well have been in a position to complain. However, as the verdict now stands,

FFZ—GR—3-17-73—3M—0183

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it is fully supported by the evidence produced at the trial.

For the foregoing reasons there is no basis for defendant's third claim.

IV

Defendant maintains that the indictment and all evidence presented at the December 19, 1973 session of the grand jury was obtained in violation of defendant's Fifth and Sixth Amendment rights in that prior to his appearance on such date he was a "virtual" or "putative" defendant and was not fully advised of his constitutional rights. The government maintains that there is no requirement of any such warning in this Circuit in a perjury case and at the same time asserts that defendant was given a full warning of his constitutional rights before his first appearance before the grand jury on June 11, 1973 and again before he was examined by the United States Attorney at a deposition on December 17, 1973.

In view of the fact that the defendant was also indicted and convicted for obstruction of justice (count 3 of the indictment) it would appear to be necessary to hold an evidentiary hearing to determine whether the warnings alleged to have been given by the government were in fact given. If they were, then it would also appear that this objection of the defendant might also not be well taken.

FPI—GPO—3-17-73—3081—0133

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V

Defendant argues that the prosecutor's failure to disclose material exculpatory evidence deprived defendant of a fair trial. The basis for defendant's argument in this respect is that in August, 1973, the government recorded a conversation between Forrest Gerry, Jr. and David Kraft in which Mr. Gerry made several statements clearly establishing that Mr. Gerry was not the hidden owner of any of the defendant's horses. Thereafter in a pre-trial discovery motion dated March 5, 1974, defendant requested all exculpatory material in possession of the government pursuant to Brady v. Maryland, 378 U.S. 83 (1963) and the government responded verbally on the same date that there was no Brady material which, according to the defendant, was untrue in the light of such recorded statement. The defendant says that he was prejudiced by this failure to disclose because had he been aware of the same he would not have requested and obtained adjournments of his trial until after the so-called Superfecta trial in which Mr. Gerry was found guilty. Thereafter defendant maintains Mr. Gerry's value as a defense witness was virtually destroyed.

Defendant argues further that if he had had this recording (which his counsel received during the so-called Superfecta trial) prior to the latter trial, he would have gone along with the government's motion to have his trial tried first and called an unconvicted Mr. Gerry as his witness.

FFI—88—9-17-73—3M—0153

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The difficulty with defendant's argument is that there was nothing to prevent him or his counsel at his trial from moving the Court to prohibit any questions directed to Mr. Gerry with respect to his convictions in view of this sequence of events. Moreover, since both of Mr. Gerry's convictions were on appeal questions with respect to the same might well have been excludable on that ground also. (It might be noted that Mr. Gerry testified in his own defense in a previous trial conducted by this judge for obstruction of justice, 74 CR 64, and the Court prohibited questions regarding his conviction in the main Superfecta trial, 73 CR 1060 since that conviction was on appeal. Mr. Castellano, who was Mr. Bonacorsa's attorney in this trial, was a co-defendant's attorney in Mr. Gerry's trial and was well aware of the Court's decision on this question.)

Mr. Gerry was available during the course of the trial and defendant could have raised all these questions with the Court at that time. He did not and the belated effort now to have the indictment dismissed on this ground is not tenable.

FPI—GS—5-17-72—3M4—9133

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VI

Defendant next complains about alleged false and misleading statements of the prosecutor during his opening to the jury in that he improperly summarized the defendant's testimony before the grand jury. This argument is also not well taken. The indictment had theretofore been read to the jury; it was read to the jury in the charge of the Court and the jury took a copy of the indictment with it during its deliberations. The jury was cautioned that the prosecutor's statements were not evidence and the jury clearly evaluated the evidence and the indictment.

VII

The defendant contends further that three questions of the prosecutor on redirect examination of the government witness were leading questions and so prejudicial to the defendant as to require a new trial. There is no question but that the subject matter of the questioning was proper for redirect examination. Under the circumstances, the Court does not feel that the allegedly objectionable questions on redirect examination (where the rule with respect to leading questions is not as strictly observed) were not prejudicial to the defendant herein.

VIII

Defendant next complains of the Court's participation in the examination of the defense witnesses, the striking of part of their testimony and the exclusion of the complete registration record of the horse Jolly Timmy. The Court's position with respect to its rulings on these questions is fully set forth in the trial record and the jury was fully instructed with respect to any questions put to any witnesses by the Court.

IX

Defendant complains further with respect to the prosecutor's summation. However, the jury was cautioned and instructed that the statements of counsel were not evidence. The summation statements complained of were arguments from facts in evidence and were not such as to require a new trial.

X

The defendant argues that because the jury was mistakenly given a copy of an original indictment filed December 19, 1973 which contained only a portion of the testimony of the defendant which the government claimed was perjurious, rather than the superseding indictment filed February 25, 1974 which contained all of such testimony, this mistake was prejudicial to the defendant. The most

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significant thing about this inadvertent error was that the jury was so alert and cognizant of all of the facts in the case that they realized that they did not have in their possession the complete text of the indictment which had been read to them and sent a note to the Court requesting clarification as to this point. Moments before receipt of such note the Court had discovered its inadvertent error. The jury was fully instructed with respect to the error and, if anything, the mistake was prejudicial to the government's case and not the defendant's case.

XI

Finally the defendant complains because the Court did not answer the aforesaid note requesting clarification with respect to the indictment which had inadvertently been given to them. As soon as the new and correct indictment was handed to the jury they needed no answer to their note, asked for none and they were able to proceed with their deliberations and reach a verdict.

* * *

The other contentions advanced by the defendant in his motion papers have been considered and are disposed of in the Court's denial of defendant's motion except to the extent that an evidentiary hearing is required with respect

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to the alleged violation of the defendant's constitutional rights in one or more of his appearances before the grand jury as indicated above.

Accordingly, except to the extent so indicated, defendant's motions are denied and an evidentiary hearing will be held on the aforesaid question on May 30, 1975 at 2PM.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

FPS—GPO—3-17-73—3024—3153

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SUPPLEMENTAL MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA — 73 CR 1069

-against-

JOSEPH BONACORSA,

Defendant.

SUPPLEMENTAL MEMORANDUM AND ORDER

June 25, 1975

----------x

PLATT, D.J.

Pursuant to this Court's Order dated May 6, 1975 (see Memorandum and Order of said date), an evidentiary hearing was held to determine whether the defendant was fully advised of his constitutional rights before his December 17-19, 1973 appearance before the Grand Jury.

The following facts were stipulated.

"At all times relevant to the investigation in the indictment Mr. Meyerson was a Special Attorney in Brooklyn Strike Force, Organized Crime Section investigating with Mr. Dillon. There was a joint investigation; United States vs. John Doe, complaint No. 731774, which resulted in the indictment of U.S. Vario et al, 73 CR 1068.

"In connection with that investigation, Mr. Bonacorsa appeared for the first time before the Grand Jury and this would at all times be the special May 1972 Grand Jury. He appeared the first time June 11, 1973 and was represented by counsel. The Government would introduce the Grand Jury testimony which has already been marked Government Exhibit 1 in Evidence in the trial of this case.

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"Mr. Bonacorsa appeared pursuant to a subpoena, and, *** his counsel -- he had counsel there, was not in the Grand Jury with him *** any rights that were given are reflected in the minutes of the Grand Jury testimony.

* * *

"Then going to September 14, 1973, which was the Friday, there was a special session of the May '72 Grand Jury called. Before any testimony was taken before the Grand Jury there, Mr. Meyerson called the approximately 20 subpoenaed witnesses, all of whom were harness drivers, and in an empty Grand Jury room without a reporter, without the Grand Jury and no minutes being taken, advised them of certain of their rights under Miranda vs. Arizona, but Mr. Meyerson, because he questioned approximately 20 men that day cannot state with definite certainty that he gave each and every right under Miranda vs. Arizona.

* * *

[Discussion between counsel whether witnesses would agree that Mr. Meyerson told the drivers that anything they said might be held against them in a court of law]

"*** Mr. Meyerson told them, words to the effect, that they were potentially targets of the investigation, but also told them that the Government wished their cooperation and indicated that at least certain things would not be done if they cooperated and gave true testimony.

* * *

"***[O]n December 13, 1973, Mr. Meyerson had decided to indict Mr. Bonacorsa *** for perjury and obstruction of justice, and Mr. Dillon had approved that decision, and that was also forwarded to Washington for their approval. ***

* * *

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"***[O]n December 17, 1973, a Monday, this was a regular day of the special May 1973 Grand Jury. However, quorum did not appear. Mr. Bonacorsa was represented by different counsel at this point, consented through his attorney to be deposed and his deposition was taken December 17, 1973 by the regular Grand Jury reporter that day, and the deposition is Government's Exhibit 4 in Evidence.

* * *

"***December 19, 1973, in chronological order, Mr. Bonacorsa appeared pursuant to the same subpoena before the May 1972 Grand Jury, which was there at a special session, this being a Wednesday, was given his rights as reflected in Government's Exhibit 5 in evidence; that after his Grand Jury appearance, Mr. Meyerson presented his case to the Grand Jury and they subsequently voted to indict Mr. Bonacorsa in 73 CR 1069, and later that day the indictment was handed up to a miscellaneous judge that day.

* * *

"***[T]he defendant was not advised of the fact that the decision to indict him had been made and approved on December 13; that he was not advised of that at any time.

* * *

"***[T]he defendant was not aware that he was to be indicted until he in fact was indicted and was arrested the day after the indictment was filed.***"

No part of defendant's Grand Jury testimony of June 11, 1973 was included in the indictment.

As indicated above, the parties were prepared to stipulate the fact that on September 14, 1973, Mr. Meyerson gave Miranda warnings to the drivers and leave open only the fact that he was not absolutely certain that he had given the warning that anything they said might be held against them in a court of law.

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In order to clarify this point, the Government, at the Court's request, called Special Attorney Harold Meyerson as a witness.

Mr. Meyerson testified that some 30 harness drivers appeared as witnesses in the morning and afternoon of September 14, 1973 and he personally addressed both groups. He said that the defendant Bonacorsa was there with his attorney, Ms. Caplan, at one of the sessions. He further testified that he advised all of them that they were potential targets of the investigation and that he was certain that he had given those present at both the morning and afternoon session Miranda warnings. His only uncertainty (which seemed to arise because he did not give complete warnings to the defendant in his actual Grand Jury appearance on December 17/19, 1973) was as to whether he might have inadvertently omitted a part of the Miranda warnings on September 14. However, one of the main reasons he said for calling the meeting was to give the warnings and he was fully conversant with the warnings himself having been a Special Attorney for six months and Judge Zavatt's law clerk prior to that.

The defendant called his former attorney, Ms. Caplan, who confirmed that Mr. Meyerson had warned all of the drivers, including her client, that they were potential targets but denied that he had given any Miranda warnings whatsoever. This wa surprising because even the defendant was prepared at the outset to concede and stipulate that Mr. Meyerson gave some but possibly not all of the Miranda warnings.

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Ms. Caplan, however, was concededly not a criminal lawyer having spent almost all of her professional career in commercial law and may well not have appreciated the significance of all that Mr. Meyerson said particularly since she seems to have been "flabbergasted" by his remarks that the investigation was the biggest scandal in the racing and/or sports world. This claim by Mr. Meyerson appears to have unnerved her somewhat and may well have diverted her thinking from all else that may have been said.

In any event, under the circumstances the Court has no reason to doubt Mr. Meyerson's statements that the warnings were in fact given and it finds that they were. In addition, of course, the defendant was represented by counsel of his own choice on each appearance.

This leaves only the question of whether the Government properly called the defendant back before the Grand Jury on December 17th and 19th after it had decided to ask for an indictment against him for perjury without warning the defendant that he was a target.

Defendant concedes, however, that he was warned that he was a potential target on September 14, 1973. In addition, Mr. Meyerson said that on numerous occasions, including he believes on December 14th, after he decided to make the recommendation to the Department of Justice, he told defendant's then attorney that he had serious doubts about the defendant's and Mr. Lentsch's veracity. (Mr. Lentsch was a

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principal witness for the defendant both before the Grand Jury and at the trial).

Moreover, apparently in response to one of such statements, defendant's attorney furnished the Government with an affidavit from Mr. Lentsch and a statement from the defendant (Exhibit A) some time in November of 1973. Defendant must have well known that he was a target; otherwise there would have been no need for such exculpatory material.

Thus on the facts, defendant's motion must be denied. In addition, the law also appears to support the Government's position.

In this Circuit there is no need to give Miranda warnings to a witness who while being questioned with respect to other crimes (here the so-called Superfecta case), perjures himself and is thereafter indicted for perjury. United States v. Corallo, 413 F.2d 1306, 1330 (2d Cir. 1969). Nor is there any need to warn the witness that he is a perjury target even when the Government has all the evidence marshalled for the case against him. United States v. Sweig, 441 F.2d 114 (2d Cir. 1971).

Under all the circumstances defendant's motion must be denied and he is directed to appear for sentencing on June 27, 1975 at 10:00 a.m..

One final word with respect to point 7 (page 8) of the Court's original Memorandum and Order dated May 6, 1975,-

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in the second line of the third sentence the word "not" should be eliminated since it clearly is an erroneous typographical insert.

SO ORDERED.

Thurm C. Pett

U.S.D.J.

FP1—SS—3-17-72—3BM—0153

ORDER AMENDING SUPPLEMENTAL MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA

73 CR 1069

-against-

ORDER AMENDING SUPPLEMENTAL MEMORANDUM AND ORDER DATED JUNE 25, 1975

JOSEPH BONACORSA,

Defendant.

July 3, 1975

- -x

PLATT, D.J.

Supplemental Memorandum and Order dated June 25, 1975 is hereby amended so as to delete the words "The following facts were stipulated" appearing after the first paragraph and substituting in place thereof the following:

"At the outset of the hearing, the attorneys indicated that they were prepared to stipulate to the following facts and did so stipulate except as to the matter contained in the second full paragraph of page 2 hereof:"

SO ORDERED.

Thomas C. Platt

U.S.D.J.

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of February , one thousand nine hundred and seventy-six.

Present: HON. LEONARD P. MOORE

HON. WILFRED FEINBERG

HON. ELLSWORTH VAN GRAAFEILAND

Circuit Judges.

United States of America, Plaintiff-Appellee v. Joseph Bonacorsa, Defendant-Appellant.	75-1284

A petition for a rehearing having been filed herein by counsel for the appellant, Joseph Bonacorsa,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

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ORDER DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held a the United States Court House, in the City of New York, on the twenty-sixth day of February , one thousand nine hundred and seventy-six.

United States of America,

Plaintiff-Appellee

v.

75-1284

Joseph Bonacorsa,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard on banc having been filed herein by counsel for the appellant, Joseph Bonacorsa, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman

IRVING R. KAUFMAN, Chief Judge

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

-vs-

SUPERSEDING INDICTMENT

JOSEPH BONACORSA,

18 U.S.C. §1623

Defendant

----------x

THE GRAND JURY CHARGES:

COUNT I

On or about the 14th day of September and the 19th day of December, 1973, within the Eastern District of New York, a competent tribunal, that is, a Grand Jury of the United States of America, duly impanelled and sworn in the United States District Court for the Eastern District of New York, was conducting an inquiry to determine among other things,

whether, in connection with the case of United States -v- John Doe, Criminal case No. 731774, there had been committed in the Eastern District of New York violations of 18 U.S.C. §224 (Sports Bribery) and other Federal criminal statutes, said inquiry being a case in which a law of the United States authorized an oath to be administered.

It was material to this Grand Jury inquiry to ascertain, among other things:

a. Whether or not there was any business relationship between the defendant and Forrest Gerry, Jr.

b. Whether or not Forrest Gerry, Jr. was the real and actual owner of horses listed in other persons names.

c. Whether or not Forrest Gerry, Jr. was the real and actual owner of horses listed in Joseph Bonacorsa's

name.

d. Whether or not Joseph Bonacorsa was the real and actual owner of horses listed in his or his family's name.

e. Whether or not Joseph Bonacorsa dealt directly with Steve Rubin and Richard Schweitzer in purchasing a horse named "Jolly Timmy."

On or about the 14th day of September and the 19th day of December, 1973, within the Eastern District of New York, the defendant JOSEPH BONACORSA, having duly taken an oath before the said Grand Jury that, as a witness before said Grand Jury, he would testify truly, did then and there, wilfully and contrary to such oath, state material matter which he did not believe to be true and knew to be false to wit:

SEPTEMBER 14, 1973 TESTIMONY

Q. Are any horses which you now own or train or have driven really owned by Forrest Gerry?

A. No, sir.

.....

Q. Did you ever purchase race horses for Forrest Gerry under your name or your wife's name?

A. No.

Q. Or anyone else's name.

A. No.

Q. Do you know if Forrest Gerry ever purchased horses under anyone else's ownership?

A. No, I don't.

DECEMBER 19, 1973 TESTIMONY

Q. Now, Monday you were here and there weren't enough Grand Jurors and

because there weren't enough Grand Jurors we had a deposition taken, is that correct?

A. Yes.

Q. And we have the minutes which you have in your hand, is that correct?

A. Yes.

MR. MEYERSON: Let's mark this for identification as a Grand Jury Exhibit.

(Whereupon, the aforementioned transcript was marked Grand Jury Exhibit 2, as of this date, by the reporter.)

Q. Have you read this deposition?

A. Yes.

Q. Which is Grand Jury Exhibit 2?

A. Yes.

Q. Is everything you said in there the truth and accurate?

A. Yes, sir.

Q. And is it all accurate as to what you did say at that time?

A. I believe it is, Mr. Meyerson.

Q. And you stick to those statements today, is that correct?

A. Yes.

Q. And if you were asked the same questions today, you would answer in the same way?

A. Yes, Mr. Meyerson.

Q. You adopt those statements as yours for the purposes of this proceeding?

A. Yes, Mr. Meyerson.

Grand Jury Exhibit #2 states in pertinent part, as follows:

Q. What about the fifth horse?

A. I didn't want to hold any money. The fifth horse I bought outright and I believe I remember the name of the people was

Ruben. Steve Ruben.

Q. And anybody else?

A. I think he had a partner but I dealt with Steve because he was a trainer and so on and so forth and I got a bill of sale from him for the amount that I purchased the horse for and also we paid the City sales tax to the tax people for the amount of the horse.

Q. You dealt with him directly?

A. Yes.

Q. How did you pay him, with a check or cash?

A. No cash.

Q. Do you remember approximately when this was?

A. It was in February sometime, Hal. I don't know the exact date right offhand.

Q. How many times did you deal with him, just that one time?

A. With who is this?

Q. Mr. Ruben.

A. Just the one time, Yes.

Q. And this is for the horse Joli Timmy? Is that correct?

A. Right.

. . . . .

Q. I would like to go over now your testimony concerning Forrest Gerry.

A. Okay.

. . . . .

Q. And did you ever have any business deals with him at all?

A. No. No.

Q. No business dealings with him?

A. No. Not that I can remember of any type. The only business dealing I ever had with Forrest Gerry was when I first met him, many years ago. It must have been

fifteen years or better. A young boy come to the track was looking for a goat and I sold him a goat for $10.

. . . . .

Q. You never bought or sold horses from him?

A. No, I didn't.

Q. And he was never your agent in buying or selling any horses?

A. No.

(Title 18, United States Code, Section 1623)

COUNT II

On or about the last week in February, 1973 in the Eastern District of New York, JOSEPH BONACORSA did corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Eastern District of New

York, by corruptly endeavoring to influence, obstruct, and impede Steve Rubin, a witness, who knew material facts and was expected to testify to them and be called as a witness and was so called as a witness before the Special May 1972 Grand Jury inquiring in said District into possible violations of the sports bribery law, 18 United States Code, Section 224, to give material false testimony before said body in relation to the aforesaid violation.

(Title 18, United States Code, Section 1503)

COUNT III

On or about the month of September, 1973 within the Eastern District of New York, JOSEPH BONACORSA did corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States

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District Court, for the Eastern District of New York, by corruptly endeavoring to influence, obstruct and impede Steve Rubin, a witness, who knew material facts and was expected to testify to them and be called as a witness and was so called as a witness before the Special May 1972 Grand Jury inquiring in said District into possible violations of the sports bribery law, 18 United States Code, Section 224, to give material false testimony before said body in relation to the aforesaid violation.

(Title 18, United States Code,
Section 1503)

A TRUE BILL

/s/ Ralph A. Williamson
FOREMAN

/s/ Edward J. Boyd 5th (HM
EDWARD J. BOYD 5th
UNITED STATES ATTORNEY